

1 BRIAN M. BOYNTON  
Principal Deputy Assistant Attorney General  
Civil Division  
2 JAMES G. TOUHEY, JR.  
Director, Torts Branch  
3 PHILIP D. MACWILLIAMS  
Trial Attorney  
4 D.C. Bar No. 482883  
ASHLEY R. GARMAN  
5 Trial Attorney  
N.Y. Bar No. 4904009  
6 SARAH E. KLEIN  
Trial Attorney  
7 Florida Bar No. 119533  
8 E-mail: Ashley.R.Garman@usdoj.gov  
U.S. Department of Justice  
9 Civil Division, Torts Branch  
10 175 N Street, NE  
Room 11-1330  
11 Washington, DC 20530  
Telephone: (202) 305-2609  
12 Facsimile: (202) 616-5200  
13 Attorneys for the United States of America

14 **IN THE UNITED STATES DISTRICT COURT**  
15 **FOR THE DISTRICT OF ARIZONA**

16 C.M., on her own behalf and on behalf of  
17 her minor child, B.M.; L.G., on her own  
behalf and on behalf of her minor child,  
18 B.G.; M.R., on her own behalf and on  
behalf of her minor child, J.R.; O.A. on her  
19 own behalf and on behalf of her minor  
child, L.A.; and V.C., on her own behalf and  
20 on behalf of her minor child, G.A.,

21 Plaintiffs,

22 v.

23 United States of America,

24 Defendant.

No. 2:19-CV-05217-PHX-SRB

**DEFENDANT UNITED STATES'  
REPLY IN SUPPORT OF ITS  
MOTION TO COMPEL THE ADULT  
PLAINTIFFS TO SUBMIT TO RULE  
35 PSYCHOLOGICAL  
EXAMINATIONS AND SECOND  
MOTION TO EXTEND EXPERT  
DISCOVERY DEADLINES**

1 Plaintiffs concede that they have put their mental conditions “in controversy” in this  
2 litigation by alleging severe and ongoing mental and emotional injuries, and that, in such  
3 circumstances, it is “normal practice” for a Court to permit Rule 35 psychological  
4 examinations by the defendant’s expert. That is so even where the plaintiffs have sat for  
5 depositions, been examined by their own experts, or produced documents relating to their  
6 mental conditions. Examination by a defendant’s expert is often the only means by which  
7 the defendant can determine the extent of a plaintiff’s mental and emotional injuries and  
8 subject the assessments of plaintiff’s expert to adversarial testing. And experienced  
9 psychologists like Defendant’s expert, Dr. Winkel, can and regularly do perform those  
10 examinations without posing any risk of harm.

13 Plaintiffs provide no persuasive reason why the Court should deviate from that  
14 standard practice here. The President has denounced the prior practice of separating  
15 children from their parents at the United States-Mexico border and condemned “the human  
16 tragedy” that occurred. But Plaintiffs’ claims of liability and their requests for damages  
17 must be assessed on an individual basis; indeed, presumably for that reason, Plaintiffs  
18 themselves each sat for multiple examinations by their own chosen expert. Defendant  
19 plainly has “good cause” to conduct the same examinations that Plaintiffs themselves  
20 deemed necessary to prove their case. And those examinations are particularly important  
21 here, given that Plaintiffs’ allegations of mental and emotional injury are not an incidental  
22 part of their claims, but instead form the core basis for their damages claim.

26 The United States did not, as Plaintiffs contend, unreasonably delay in seeking  
27 these examinations. Rather, the United States undertook good-faith efforts to narrow the  
28

1 issues and potentially avoid the need for contested motions practice before filing this  
 2 motion—including reviewing Plaintiffs’ expert disclosures, conferring with Plaintiffs, and  
 3 proposing to conduct such examinations under the same conditions agreed to in another  
 4 similar family-separation litigation. When those efforts proved unsuccessful, Defendants  
 5 moved promptly to compel the examinations of the Adult Plaintiffs. The United States  
 6 proposes to conduct those examinations under reasonable conditions that are no more  
 7 intrusive than the conditions under which Plaintiffs conducted their own examinations.  
 8 Further, Plaintiffs’ failure to provide complete expert disclosures until nearly three weeks  
 9 *after* their August 25, 2022 disclosures deadline justifies an extension of time for the  
 10 United States to serve its expert disclosures. Accordingly, the United States’ motions for  
 11 an order compelling the Adult Plaintiffs to submit to Rule 35 psychological examinations  
 12 by Dr. Winkel and for an extension of the expert disclosure deadline to allow for the  
 13 examinations should be granted.

## 17 ARGUMENT

### 18 **A. Good Cause Exists for Rule 35 Examinations of the Adult Plaintiffs, and the** 19 **Proposed Parameters of Such Examinations are Reasonable**

20 Though Plaintiffs concede that Rule 35 examinations would ordinarily be  
 21 appropriate in a tort suit asserting ongoing severe mental and emotional harm, they argue  
 22 that such examinations are not necessary here because the United States “already *knows*  
 23 how Plaintiffs have been traumatized,” Pls.’ Opp. (ECF No. 292) at 13-14 (emphasis in  
 24 original). That contention misses the mark. Although the government has condemned the  
 25 prior practice of separating parents from children, acknowledged that many families have  
 26 suffered, and made mental health resources available for separated families in general,  
 27  
 28

1 those statements and actions do not establish the nature or extent of any harm that *these*  
2 *specific Plaintiffs* suffered as a result of their separations, or inform the damages analysis.  
3 In this litigation, each Plaintiff—like any other plaintiff bringing a claim for intentional  
4 infliction of emotional distress under Arizona law—must prove, among other elements,  
5 that they suffered “severe emotional distress” as a result of Defendant’s conduct. *Citizen*  
6 *Publ’g Co. v. Miller*, 115 P.3d 107, 110 (Ariz. 2005) (en banc) (citations omitted). A  
7 determination of whether a plaintiff suffered severe emotional distress requires an  
8 individualized assessment of that plaintiff’s symptoms, *see E.E.O.C. v. GLC Restaurants,*  
9 *Inc.*, 2006 U.S. Dist. LEXIS 78270, at \*\*27-28 (D. Ariz. Oct. 26, 2006), and cannot be  
10 established merely by reference to what one might expect or predict as a general matter.  
11 *See* 136 Am. Jur. Proof of Facts 3d 175 (originally published in 2013) (recognizing that  
12 claims for infliction of emotional distress necessarily turn on individualized factors).

13  
14  
15  
16 Furthermore, beyond the “severe emotional distress” inquiry, considering causation  
17 and damages in the context of a tort claim for emotional distress requires particularized  
18 assessment of numerous factors such as, for example, a plaintiff’s current presentation,  
19 prognosis, treatment needs, and possible alternative or contributing causes. Presumably, it  
20 is for these very reasons that Plaintiffs retained their own expert to conduct mental health  
21 evaluations of each Plaintiff. The United States should be afforded an equal opportunity  
22 to conduct its own individualized assessments in order to defend against Plaintiffs’  
23 liability and damages claims. *See Alvarado v. Northwest Fire Dist.*, 2020 U.S. Dist.  
24 LEXIS 79584, \*\*7-8 (D. Ariz. May 5, 2020) (claim of emotional distress, accompanied  
25 by, *inter alia*, a cause of action for intentional infliction of emotional distress, an  
26  
27  
28

1 allegation of a specific mental or psychiatric injury or disorder, *or* a claim of unusually  
2 severe emotional distress, is sufficient to support Rule 35 examination) (quoting *Turner v.*  
3 *Imperial Stores*, 161 F.R.D. 89, 95 (S.D. Cal. 1995)).

4         Plaintiffs’ argument that other discovery provided in this litigation obviates the  
5 United States’ need for its expert to examine the Adult Plaintiffs, Pls.’ Opp. (ECF No.  
6 292) at 6-7, 14, is equally mistaken. As the United States explained in its motion, it  
7 should not be precluded from conducting Rule 35 examinations because Plaintiffs have  
8 been deposed, have submitted expert reports, and have produced some document  
9 discovery regarding their mental conditions. *See* Defs.’ Mot. for Rule 35 Examinations  
10 (ECF No. 288) at 8-9 (citing cases). Those discovery devices are not substitutes for  
11 examinations performed by an expert psychologist. *See Ashley v. City & County of San*  
12 *Francisco*, 2013 U.S. Dist. LEXIS 77134, \*\*7-8 (N.D. Cal. May 30, 2013) (although  
13 defense expert could review plaintiff’s videotaped deposition and medical records,  
14 “Defendants have the right to perform their own assessment, because one of the purposes  
15 of Rule 35 is to level the playing field in cases where physical or mental condition is at  
16 issue”). Plaintiffs do not cite any cases to the contrary or explain why they nonetheless  
17 believe that document and deposition discovery is an adequate substitute for Rule 35  
18 evaluations here, nor could they persuasively do so.

19         Further, despite Plaintiffs’ assertion that they have produced “substantial document  
20 evidence outlining Plaintiffs’ ongoing harms,” Pls.’ Opp. (ECF No. 292) at 7, four of the  
21 five Adult Plaintiffs have not seen any mental health professional—except for Plaintiff’s  
22 retained expert—since their release from immigration detention in late 2018, resulting in  
23  
24  
25  
26  
27  
28

1 an absence of treatment records. *See, e.g.*, Exhibit 1 (O.A. Dep. Tr.) at 98:15—100:6;  
 2 Exhibit 2 (L.G. Dep. Tr.) at 124:1—125:6; Exhibit 3 (filed under seal) at 112:14-19,  
 3 118:5-21, 122:1-5; Exhibit 4 (C.M. Dep. Tr.) at 37:19-25. Furthermore, to the extent  
 4 Plaintiffs suggest that their allegations of severe, ongoing, and permanent mental or  
 5 emotional injuries are uncontroverted in discovery, that is inaccurate. *See, e.g.*, Exhibit 2  
 6 (L.G. Dep. Tr.) at 125:3-10 (L.G. stating that she has no mental health issues that affect  
 7 her in her daily life); Exhibit 1 (O.A. Tr.) at 101:8—102:1 (O.A. stating that she has made  
 8 progress over time, and that her daughter L.A. “is good now”); Exhibit 4 (C.M. Dep. Tr.)  
 9 at 50:14—51:15, 54:7-20 (C.M. stating that she saw a psychologist while in detention after  
 10 reunification with her child because her attorney had instructed her to do so, not because  
 11 she had any “mental condition” or because she was upset or scared).<sup>1</sup> Given that questions  
 12 remain regarding the nature, extent, and causes of the Adult Plaintiffs’ claimed injuries—  
 13 questions which are critical for both the liability and damages inquiry and which will be  
 14 explored by Dr. Winkel during his examinations—there exists good cause for the proposed  
 15 Rule 35 examinations even though other discovery methods have been permitted regarding  
 16 Plaintiffs’ claims. *See Perona v. Time Warner Cable*, 2016 U.S. Dist. LEXIS 202950 \*14  
 17 (C.D. Cal. May 5, 2016) (“Only if no additional relevant information could be gained by  
 18 an examination should defendant’s expert be denied examination.” (citation and internal  
 19 quotation marks omitted)).

20  
 21  
 22 Finally, although Plaintiffs contend that they have significant interests in not being  
 23 subjected to examinations, Pls.’ Opp. (ECF No. 292) at 15-16, that unspecified interest

24  
 25  
 26  
 27  
 28 <sup>1</sup> The United States provides these record citations by way of example only, and not as all evidence adduced in discovery in contradiction of Plaintiffs’ claims.

1 does not outweigh the United States' right to develop its defense to Plaintiffs' claims.  
2 Plaintiffs state that they have work and child care responsibilities, but such obligations are  
3 common to many tort plaintiffs, and Dr. Winkel would work with Plaintiffs to minimize  
4 any inconvenience, for example by conducting the examination on a non-workday if  
5 possible. Nor is there any basis for Plaintiffs' suggestion that they would be harmed by  
6 the requested examinations by the United States' expert—which, as discussed below,  
7 would be conducted in a professional manner by an experienced psychologist, pursuant to  
8 reasonable and non-invasive conditions that (like the expert examinations that Plaintiffs'  
9 own experts repeatedly conducted) pose no risk of traumatizing the Plaintiffs. Thus,  
10 Plaintiffs have failed to demonstrate that their interests in not submitting to the  
11 examinations outweigh the United States' right to a fair trial. *See Silva v. Mercado Food*  
12 *Enter.*, 2012 U.S. Dist. LEXIS 6463, \*\*10-12 (E.D. Cal. 2012).

13  
14  
15  
16 Furthermore, contrary to Plaintiffs' assertions, the United States' proposed  
17 parameters for the requested Rule 35 examinations are well within the bounds of what  
18 courts have found reasonable, are consistent with those in another family-separation case  
19 pending in another district, and are less burdensome than the multiple, multi-day  
20 examinations conducted by Plaintiffs' own experts. The proposed content (a clinical  
21 interview and standardized testing) and duration (*i.e.*, not to exceed eight hours, inclusive  
22 of breaks) of the requested examinations are entirely reasonable.<sup>2</sup> *See* Defs.' Mot. for  
23  
24  
25

---

26 <sup>2</sup> Indeed, Plaintiffs' own expert examined Plaintiffs over multiple full days, in some cases,  
27 as much as five-and-a-half days. Like Defendant's proposal, Plaintiffs' expert's  
28 examinations included a clinical interview and the administration of tests or  
questionnaires.

1 Rule 35 Examinations (ECF No. 288) at 12 (collecting cases). Moreover, the United  
 2 States' proposal makes accommodations for each Plaintiff's language preference, *see id.*  
 3 at 13 (Defendant's expert, a native Spanish speaker, will conduct the examination in the  
 4 examinee's preferred language, and will proceed through a translator if necessary), and the  
 5 Plaintiff's preferred geographic location, *see id.* at 10-11 (explaining that Defendant will  
 6 conduct the examination in the preferred geographic location of the Plaintiff to be  
 7 examined, wherever possible). And under the United States' proposal, the examinations  
 8 will not be audio or video recorded—just as Plaintiffs' expert's examinations were not.<sup>3</sup>

11 Any potential temporary licensing issues also do not provide a basis for denying the  
 12 Rule 35 examinations. The United States' expert faces no licensing restriction in Arizona,  
 13 where Plaintiffs chose to bring this lawsuit. And although plaintiffs are usually required to  
 14 travel to the forum state for Rule 35 examinations, 8B Fed. Prac. & Proc. Civ. § 2234 (3d  
 15 ed.), the United States has agreed to conduct the examinations, if authorized, in the  
 16 Plaintiff's preferred geographic location wherever possible.<sup>4</sup> As noted in its motion, the  
 17 United States previously requested that Plaintiffs provide their preferred city and state for  
 18  
 19

---

21 <sup>3</sup> Plaintiffs argue that the Court should require the video recording of the examinations  
 22 given Plaintiffs' concerns regarding language and literacy issues. Pls.' Opp. (ECF No.  
 23 292) at 17. But Defendant's proposal provides more appropriate and less intrusive  
 24 accommodations for any language and literacy issues. Defendant's chosen expert, fully  
 25 fluent in English, is also a native Spanish speaker who has conducted hundreds of  
 26 examinations in Spanish. *See Winkel Decl.* (ECF No. 288-2). To the extent an  
 27 examination needs to be conducted in a language other than Spanish or English, Defendant  
 28 will conduct the examination through an interpreter—just as Plaintiffs' expert did.

<sup>4</sup> Temporary licensing requirements vary from state to state, so Defendant needs to know  
 the state in which the examination would occur before its expert applies for a temporary  
 license. It is the United States' understanding through Spring/Summer 2022, many states  
 had relaxed or waived temporary licensure requirements as a result of the COVID-19  
 pandemic. Since that time, however, many states have re-tightened their licensure  
 requirements.



1 each examination, but Plaintiffs never provided that information. *See* Defs.’ Mot. for Rule  
 2 35 Examinations (ECF No. 288) at 11. Based on Defendant’s current understanding, two  
 3 of the five Adult Plaintiffs currently reside in Florida, which does not present any  
 4 licensing issues for Defendant’s expert. As for the other three Adult Plaintiffs,  
 5 Defendant’s expert will make all reasonable efforts to obtain temporary licenses in or near  
 6 Plaintiff’s preferred geographic location, and Defendant will do its best to minimize any  
 7 travel by Plaintiffs.  
 8

9  
 10 **B. The United States Has Not Unreasonably Delayed in Seeking the Rule 35**  
 11 **Examinations, and Good Cause Exists to Extend the Expert Discovery**  
 12 **Deadlines**

13 The United States did not unreasonably delay in seeking an extension of its expert  
 14 disclosures deadline, as Plaintiffs claim. The United States sought an extension of its  
 15 expert disclosures deadline on August 12, 2022—*before* Plaintiffs’ expert disclosures  
 16 deadline (ECF No. 268). But Plaintiffs argued then that the United States’ request was  
 17 premature, and the United States’ motion was denied on that basis (ECF No. 276). Upon  
 18 reviewing Plaintiffs’ expert reports, the United States revisited the topic of Rule 35  
 19 examinations, as Plaintiffs invited it to do.<sup>5</sup> The United States then reached out to  
 20 Plaintiffs in an attempt to reach an agreement without court intervention, and the parties  
 21 engaged in good-faith negotiations. *See* Defs.’ Mot. for Rule 35 Examinations (ECF No.  
 22 288) at 15. Only once Plaintiffs advised the United States that they would not agree to an  
 23 initial extension of the United States’ expert disclosures deadline in order to continue  
 24  
 25

26  
 27 <sup>5</sup> *See* Pls.’ Opp. to Defs.’ 1st Mot. for Extension (ECF No. 273) at 1 (“If Defendant  
 28 decides to seek Rule 35 psychological examinations after reviewing Plaintiffs’ expert disclosures, the parties and the Court can address any necessary extensions at that time.”).

1 those negotiations and that they did not consent to the United States’ proposed Rule 35  
2 examinations of the Adult Plaintiffs did this motion become necessary. *Id.* at 15-16.<sup>6</sup>

3 Moreover, Plaintiffs largely ignore that the United States’ extension request is  
4 independently premised upon Plaintiffs’ failure to make timely complete expert  
5 disclosures. *See* Scheduling Order at 4 (ECF No. 144) (“Plaintiffs shall provide full and  
6 complete expert disclosures, as required by Rule 26(a)(2)(A) - (C) of the Federal Rules of  
7 Civil Procedure, no later than August 25, 2022.”). It is undisputed that Plaintiffs’ expert  
8 reports did not contain all “the facts or data considered by the [expert] witness in forming  
9 [their opinion],” as required by Rule 26(a)(2)(B)(ii). In forming her opinions, Plaintiffs’  
10 expert purportedly relied on responses to certain tests or questionnaires the expert  
11 administered to each of the Plaintiffs. Yet Plaintiffs did not provide Defendant with any of  
12 the Plaintiffs’ answers to those tests or questionnaires—*i.e.*, the raw data—until September  
13 13, 2022, and only after Defendant specifically requested it. The United States’ experts  
14 are entitled to review and consider that material in forming their opinions. Accordingly,  
15 separate and apart from the United States’ request for Rule 35 examinations of the Adult  
16 Plaintiffs, an extension of its expert disclosure deadline related to all Plaintiffs is  
17 warranted based on Plaintiffs’ delay.

22  
23  
24 <sup>6</sup> The United States’ requested extension is warranted not only to ensure adequate time to  
25 conduct the Rule 35 examinations, if permitted, but also to enable Defendant’s experts to  
26 complete their reports. While they have been working diligently on reviewing Plaintiffs’  
27 expert disclosures and preparing their own reports, the uncertainty regarding the Rule 35  
28 examinations necessarily has created uncertainty regarding the scope of Defendant’s  
experts’ reports. And, as explained below, Defendant’s experts have been hindered by  
Plaintiffs’ nearly three-week delay in providing the raw data underlying their expert’s  
opinions.

**CONCLUSION**

For the foregoing reasons, the Court should grant the United States' motion in its entirety.

Submitted this 13<sup>th</sup> day of October, 2022.

BRIAN M. BOYNTON  
Principal Deputy Assistant Attorney General,  
Civil Division  
JAMES G. TOUHEY, JR.  
Director, Torts Branch

s/ Ashley R. Garman  
ASHLEY R. GARMAN  
Trial Attorney  
N.Y. Bar No. 4904009  
SARAH E. KLEIN  
Florida Bar No. 119533  
E-mail: Ashley.R.Garman@usdoj.gov  
U.S. Department of Justice  
Civil Division, Torts Branch  
Benjamin Franklin Station, P.O. Box 888  
Washington, DC 20044  
Telephone: (202) 305-2609  
Attorneys for the United States of America